

1 The Honorable Ronald B. Leighton
2
3
4
5
6

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

CHERYL KATER, individually and on behalf
of all others similarly situated,

Case No. 2:15-cv-00612-RBL

Plaintiff,

v.

CHURCHILL DOWNS INCORPORATED, a
Kentucky Corporation.

**AMENDED JOINT STATUS REPORT
AND DISCOVERY PLAN**

Defendant.

Pursuant to Fed. R. Civ. P. 26, Plaintiff Cheryl Kater (“Plaintiff”) and Defendant Churchill Downs Incorporated (“Defendant”) (collectively, the “Parties”) submit the following Amended Joint Status Report and Discovery Plan.

I. NATURE AND COMPLEXITY OF THE CASE

Plaintiff: In this putative class action, Plaintiff alleges that Big Fish Casino constitutes illegal gambling, and seeks to recover the money she alleges she lost as a result of her gameplay. On behalf of herself and a putative nationwide class, Plaintiff alleges claims under Washington’s Recovery of Money Lost and Gambling Act (RMLGA), Wash. Rev. Code § 4.24.070, under Washington’s Consumer Protection Act, Wash. Rev. Code § 19.86.010, and for unjust enrichment against Defendant Churchill Downs. Insofar as this case is a putative class action, Plaintiff contends it is “complex.”

Defendant: Churchill Downs contends that Big Fish Casino—a virtual game platform that can be downloaded free of charge—does not constitute gambling within the meaning of the

1 Washington Gambling Act, Wash. Rev. Code § 9.46.0237. For that and other reasons, Plaintiff,
 2 a Michigan resident, cannot prevail on any of the three Washington law claims alleged.
 3 Moreover, Big Fish Games, Inc.—which owns and operates Big Fish Casino—was a wholly
 4 owned, indirect subsidiary of Churchill Downs until January 2018 when Churchill Downs sold
 5 its entire interest in Big Fish Games. As described more fully below, Defendant contends that
 6 Plaintiff improperly filed this putative class action against Churchill Downs rather than its
 7 former wholly owned, indirect subsidiary, Big Fish Games, and that Big Fish Games must be
 8 joined as a necessary party under Rule 19 of the Federal Rules of Civil Procedure. Defendant
 9 contends that the case does not “present unusual problems . . . which require extraordinary
 10 treatment,” and that it is therefore not a complex case under Local Rule W.D. Wash. LCR
 11 102(a).

12 **II. DEADLINE FOR DEFENDANT TO ANSWER PLAINTIFF’S COMPLAINT.**

13 Defendant answered Plaintiff’s complaint on **November 16, 2018**.

14 **III. DEADLINE FOR JOINDER OF ADDITIONAL PARTIES**

15 The Parties’ proposed deadline for joinder of additional parties without leave of Court is
 16 **March 1, 2019.**

17 **Defendant:** Defendant anticipates filing a motion to join Big Fish Games as a necessary
 18 party under Rule 19 of the Federal Rules of Civil Procedure before that date. Defendant objects
 19 to any extension of the deadline for joinder without leave of Court, and reserves all rights to
 20 object to any substitution of a new class representative.

21 **Plaintiff:** Though Plaintiff believes Big Fish Games is not a “necessary party” under
 22 Rule 19, Plaintiff—in an effort to minimize unnecessary burdens upon the Court—does not
 23 anticipate opposing a motion by Defendant to join Big Fish Games into this case. Plaintiff and
 24 her counsel anticipate potentially adding several additional class representatives to this case.
 25 Plaintiff also proposes that, if the Court determines on class certification that a class should be
 26 certified but the class representative cannot be Plaintiff Kater or any other proposed class
 27

1 representatives, the deadline for joining replacement class representatives should be 60 days after
 2 the date of that order.

3 **IV. CONSENT TO MAGISTRATE**

4 No.

5 **V. PROPOSED DISCOVERY PLAN**

6 **A. Fed. R. Civ. P. 26(f) Conference**

7 The parties held a Federal Rule of Civil Procedure 26(f) conference on December 5,
 8 2018.

9 **B. Initial Disclosures pursuant to Fed. R. Civ. P. 26(a)**

10 The parties have exchanged initial disclosures.

11 **C. Discovery Subjects, Timing, and Phasing**

12 *i. Subjects on which discovery may be needed.*

13 **Plaintiff:** Plaintiff anticipates taking discovery on at least the following non-exhaustive
 14 list of topics: (1) whether Defendant was the “proprietor for whose benefit” Big Fish Casino
 15 operated, *see* RCW 4.24.070; (2) the total number of individuals who lost money playing
 16 Defendant’s social casino games, (3) the total amount of money lost by Plaintiff and members of
 17 the putative class on Defendant’s social casino games, (4) the distribution of revenues Defendant
 18 collected from members of the putative class; (5) notes, memoranda, emails, studies, or other
 19 internal documents relating to the addictive qualities of Defendant’s social casino games; (6) the
 20 source code, developer notes, and databases underlying Defendant’s social casino games; and (7)
 21 statistics relating to the putative class’ experience playing Defendant’s social casino games (*e.g.*,
 22 including the average length of individual gameplay sessions for class members).

23 **Defendant:** Defendant notes that most of the discovery sought by Plaintiff resides not
 24 with Defendant but with Big Fish Games. Defendant further suggests that a key subject of
 25 discovery is what the factual basis is for Plaintiff’s claim that Defendant can be held responsible
 26 for the operation of Big Fish Casino given Defendant and Big Fish Games are, and always have
 27

1 been, separate corporate entities. In addition, Defendant anticipates taking discovery on at least
 2 the following non-exhaustive list of topics: (1) Plaintiff's motivations and reasons for playing
 3 Big Fish Casino games; (2) Plaintiff's motivations and reasons for purchasing virtual items
 4 within Big Fish Casino; (3) Plaintiff's Big Fish Casino game play, awards of free virtual items,
 5 and purchase history; (4) other Big Fish Casino users' game play and purchase histories; (5)
 6 Plaintiff's communications and interactions with and regarding Big Fish Casino; (6) Plaintiff's
 7 usage and purchase history of other online social games; (7) the amount of damages Plaintiff
 8 claims she has incurred; and (8) any additional facts bearing on the Plaintiff's adequacy to serve
 9 as class representative.

10 ii. *Timing of discovery*

11 The parties propose an approximately eight (8) month fact discovery period (for both
 12 class and merits discovery). More specifically, the parties propose that fact discovery close on
 13 **September 27, 2019**, that expert reports for the party with the burden of proof be disclosed on
 14 **October 25, 2019**, that any rebuttal expert reports be disclosed on **December 20, 2019**, and that
 15 all expert discovery close on **January 17, 2020**.

16 As noted below, the Parties propose that briefing on class certification and merits issues
 17 commence following the close of fact and expert discovery.

18 iii. *Phasing of discovery*

19 **Defendant:** Defendant proposes that discovery focused on its corporate structure and
 20 how it and Big Fish Games are, and always have been, separate corporate entities proceed first
 21 on an expedited schedule because it will show that Plaintiff improperly filed this action against
 22 Churchill Downs—which never operated Big Fish Casino—rather than its former wholly
 23 owned, indirect subsidiary, Big Fish Games. For 60 days, discovery should focus on this issue
 24 because it will likely be case dispositive for Churchill Downs and will facilitate early resolution
 25 of Defendant's anticipated motion for summary judgment on this issue. *See* Manual for
 26 Complex Litigation (4th Ed.) § 11.422 (“Targeted discovery may be nonexhaustive, conducted to
 27

1 produce critical information rapidly on one or more specific issues.”). Churchill Downs notes
 2 that, contrary to Plaintiff’s assertion below, Churchill Downs has always taken the position that it
 3 is not a proper defendant in this case, including in past court filings. *See, e.g.*, Appellee’s
 4 Motion to Substitute Under Rule 43(b), Case No. 16-35010, Dkt. 48 (9th Cir. Jan. 9, 2018)
 5 (arguing that Big Fish Games, the “real party in interest,” should be substituted for Churchill
 6 Downs because “[Big Fish Casino] is owned and operated by Big Fish Games” and Big Fish
 7 Games was always “a separate company” from Churchill Downs). Moreover, Plaintiff never
 8 alleged that Churchill Downs was the “proprietor for whose benefit” Big Fish Casino was
 9 operated, *see* RCW 4.24.070, as it has contended for the first time in this Joint Status Report.

10 **Plaintiff:** Plaintiff respectfully contends that no phasing of discovery is appropriate or
 11 necessary in this case. Defendant is the “proprietor for whose benefit” Big Fish Casino was
 12 operated—*see* RCW 4.24.070; *see also* Dkt. 2 ¶ 49—which explains why Defendant has never
 13 before argued to this Court that it is not a proper defendant in this case. Plaintiff notes that when
 14 Defendant sold Big Fish Games for \$990 million to Aristocrat Leisure, Defendant agreed under
 15 the terms of that sale that Defendant would indemnify Aristocrat for the “losses and expense”
 16 stemming from this action. *See, e.g.*, Churchill Downs Form 10-Q, at 46, available at
 17 <https://bit.ly/2RlmQpo> (last accessed January 11, 2019).

18 **D. Electronically Stored Information (ESI) Protocol**

19 The Parties anticipate filing and requesting that the Court enter an ESI Protocol based on
 20 the Western District of Washington’s Model Agreement re: Discovery of ESI.

21 **E. Privilege Issues**

22 The Parties intend to submit to the Court for its review and approval a proposed
 23 Protective Order governing the production and handling of privileged, confidential, proprietary,
 24 and otherwise sensitive discovery materials in this matter based on the Western District of
 25 Washington’s Model Stipulated Protective Order. The proposed protective order will also
 26 provide a procedure, consistent with Fed. R. Evid. 502(b), for clawing back inadvertently
 27

1 disclosed privileged documents.

2 **F. Limitations on Discovery**

3 The Parties agree that, aside from any modifications requested in their forthcoming
 4 stipulated Protective Order and/or ESI protocol and the phasing of discovery requested by
 5 Churchill Downs described above, no limitations or modifications to the discovery contemplated
 6 by the Federal Rules of Civil Procedure are necessary at this time.

7 **G. Other Discovery-Related Orders**

8 The Parties anticipate filing and requesting that the Court enter a stipulated Agreement
 9 re: Discovery of ESI and a stipulated Protective Order, both which will be modeled on versions
 10 provided by the Western District of Washington.

11 **VI. PARTIES' VIEWS, PROPOSALS, AND AGREEMENTS ON:**

12 **A. Prompt Case Resolution**

13 The Parties and their counsel will work together professionally and collaboratively
 14 toward the prompt resolution of this matter. The Parties will reasonably evaluate the relative
 15 strengths and weaknesses of their claims and defenses on a regular basis, and will keep an open
 16 dialogue as to how those strengths and weaknesses may inform the resolution of this case.

17 **Defendant:** Defendant believes that joinder of Big Fish Games as a necessary party
 18 under Rule 19 of the Federal Rules of Civil Procedure is required to permit full resolution of this
 19 case. Defendant further believes that prompt case resolution is best accomplished through
 20 expedited discovery focused on Defendant's corporate form, its former ownership of the distinct
 21 corporate entity Big Fish Games, and the factual basis for Plaintiff's claim that Defendant can be
 22 held responsible for the operation of Big Fish Casino. Plaintiff makes no veil piercing
 23 allegations in her Complaint. Defendant anticipates moving for summary judgment using this
 24 expedited discovery on the basis that there is no dispute of material fact regarding Plaintiff's
 25 improper attempt to hold Defendant responsible for any alleged actions of its former wholly
 26 owned, indirect subsidiary, Big Fish Games.

Plaintiff: Plaintiff anticipates opposing any early summary judgment motion by Defendant, and additionally anticipates opposing any efforts by Defendant to file multiple summary judgment motions.

B. Alternative Dispute Resolution

The Parties remain open to discussing the potential resolution of this matter in the future, but do not believe such discussions are appropriate at this time. Should the Parties proceed with resolution discussions, they anticipate mediating before a private mediator.

C. Related Cases

Six other cases alleging that online casino-themed games constitute illegal gambling under the RMLGA have been filed in this District. Those cases, in the order they were filed, are:

1. *Wilson v. PTT, LLC*, No. 2:18-cv-05275-RBL (W.D. Wash. Apr. 6, 2018);
2. *Wilson v. Huuuge, Inc.*, No. 2:18-cv-05276-RBL (W.D. Wash. Apr. 6, 2018);
3. *Wilson v. Playtika*, No. 2:18-cv-05277-RBL (W.D. Wash. Apr. 6, 2018);
4. *Benson v. Double Down*, No. 2:18-cv-00525-RBL (W.D. Wash. Apr. 9, 2018);
5. *Fife v. Scientific Games*, No. 2:18-cv-00565-RBL (W.D. Wash. Apr. 17, 2018);

and

6. *Bell v. Game Show Network, LLC*, No. 3:18-cv-05393-RBL (W.D. Wash. May 15, 2018).

Defendant: Defendant contends that while these cases present similar allegations and allege similar causes of action, they do not concern substantially the same parties, property, transaction, or event, and therefore are not “related cases” under Local Rule W.D. Wash. LCR 3(f)(2)(A).

Plaintiff: Plaintiff respectfully contends that this case is related to the six similar cases currently pending before the Court.

D. Discovery Management

The Parties agree that the Federal Rules of Civil Procedure and the Local Civil Rules

1 shall be used to manage discovery so as to minimize burdens and expenses.

2 **E. Anticipated Discovery Sought**

3 The Parties' descriptions of anticipated discovery are discussed above in Section 4(B),
 4 *supra*.

5 **F. Phasing Motions**

6 **Motion to Join Big Fish Games.**

7 **Defendant:** As noted above, Defendant anticipates filing a motion to join Big Fish
 8 Games as a necessary party. Plaintiff has consistently resisted adding Big Fish Games to this
 9 lawsuit. *See, e.g.*, Plaintiff-Appellant's Response in Opposition to Appellee's Motion to
 10 Substitute Under Rule 43(b), Case No. 16-35010, Dkt. 50 (9th Cir. Jan. 18, 2018). However, the
 11 federal rules dictate that Big Fish Games, the owner of the game at issue in this lawsuit, must be
 12 joined as a necessary party. A party may move to join a necessary party "at any stage in the
 13 proceeding." *See CP Nat. Corp. v. Bonneville Power Admin.*, 928 F.2d 905, 911–12 (9th Cir.
 14 1991); *see also* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just
 15 terms, add or drop a party."). Under Federal Rule of Civil Procedure 19(a), a nonparty to an
 16 action, like Big Fish Games, "must be joined" if it is feasible to do so and either one of two
 17 conditions is met. Because at least one of these conditions is met and joinder is feasible, this
 18 Court must join Big Fish Games as a necessary party.

19 **Plaintiff:** Though Plaintiff believes Big Fish Games is not a "necessary party" under
 20 Rule 19, and will continue to oppose any effort by Churchill Downs to escape this case by
 21 *substituting* another party in its stead, Plaintiff—in an effort to minimize unnecessary burdens
 22 upon the Court—does not anticipate opposing a motion by Defendant to *join* Big Fish Games
 23 into this case.

24 **Motion for Judgment on the Pleadings.**

25 **Defendant:** Defendant reserves its right to file a motion for judgment on the pleadings in
 26 accordance with Federal Rule of Civil Procedure 12(c).
 27

1 **Plaintiff:** Plaintiff will oppose any such motion.

2 **Early Motion for Summary Judgment.**

3 **Defendant:** As noted above, Defendant contends that Plaintiff has no grounds to sue
 4 Defendant for the alleged conduct of its former, wholly owned, indirect subsidiary, Big Fish
 5 Games, Inc. There will be no material dispute of fact that Defendant and Big Fish Games were
 6 always separate entities. Nor will there be any material dispute of fact that Big Fish Games, not
 7 Defendant, operated Big Fish Casino. The issue is appropriately resolved on summary judgment.
 8 *See Gebrekidan v. USAA Ins. Co.*, No. C13-0508JLR, 2013 WL 6512995 (W.D. Wash. Dec. 12,
 9 2013) (granting summary judgment to parent corporation where “Plaintiffs have made no
 10 allegations, let alone offered any evidence, indicating that [the parent] utilized the corporate form
 11 of [the subsidiary] to violate or evade a legal duty.”). Requiring the parties to quickly crystallize
 12 theories of corporate liability will allow Defendant to seek early resolution on a dispositive issue
 13 in a way that may curtail expenses and conserve judicial resources.

14 **Plaintiff:** Plaintiff expects to oppose any motion for summary judgment, including by
 15 highlighting evidence Plaintiff expects to obtain in discovery tending to show that Defendant is
 16 the “proprietor for whose benefit” Big Fish Casino was operated. *See* RCW 4.24.070. Plaintiff
 17 will oppose any effort by Defendant to file multiple summary judgment motions.

18 **Motion for Class Certification.**

19 The Parties propose that Plaintiff’s motion for class certification shall be due 28 days
 20 after the close of expert discovery, and that the briefing schedule for the class certification
 21 motion be extended so that Defendant’s opposition is due 28 days after the motion is filed and
 22 Plaintiff’s reply is due 21 days after the opposition is filed.

23 **Dispositive Motions and Daubert Motions.**

24 **Defendant:** Defendant reserves its right to file dispositive motions prior to class
 25 certification briefing. Defendant disagrees that any one-way intervention issue is ripe, and in any
 26 event disagrees with Plaintiff’s contention that any one-way intervention issue would apply here.

1 **Plaintiff:** Plaintiff proposes that any summary judgment or *Daubert* motions be filed no
 2 later than 60 days after the entry of the Court's order regarding class certification. Plaintiff
 3 respectfully contends that if Defendant files a dispositive motion prior to class certification
 4 briefing, it will have knowingly and voluntarily waived any subsequent arguments regarding the
 5 rule against one-way intervention.

6 **G. Preservation of Discoverable Information**

7 The Parties will comply with all requirements regarding preservation of discoverable
 8 information.

9 **H. Privilege Issues**

10 The Parties' forthcoming stipulated Protective Order will contain proposed procedures
 11 for governing the production and handling of privileged, confidential, proprietary, and otherwise
 12 sensitive discovery materials in this matter.

13 **I. Model Protocol for Discovery of ESI**

14 As noted above, the Parties anticipate filing and requesting that the Court enter a
 15 stipulated Agreement regarding the discovery of ESI, based on the model version provided by
 16 the Western District of Washington.

17 **VII. DATE OF COMPLETION OF DISCOVERY**

18 The Parties propose that fact discovery close on **September 27, 2019**, and that expert
 19 discovery close on **January 17, 2020**.

20 **VIII. BIFURCATION**

21 The Parties believe that class and merits discovery should proceed simultaneously given
 22 the significant overlap of class and merits issues.

23 **IX. PRETRIAL STATEMENTS AND PRETRIAL ORDERS**

24 At this time the parties do not believe it is necessary to do away with the pretrial
 25 statements and orders set forth in Local Rules 16 and 16.1.

26 **X. SUGGESTIONS FOR SHORTENING OR SIMPLIFYING CASE**

1 The Parties do not currently have any other suggestions for shortening or simplifying this
2 case.

3 **XI. JURY OR NON-JURY TRIAL**

4 Plaintiff has requested a jury trial.

5 **XII. DATE FOR TRIAL**

6 The Parties believe the case is likely to be ready for trial by August 1, 2020.

7 **XIII. NUMBER OF TRIAL DAYS**

8 The Parties believe a trial will last five (5) to ten (10) days.

9 **XIV. TRIAL COUNSEL INFORMATION**

10 **Plaintiffs Trial Counsel**

11 EDELSON PC
12 Rafey S. Balabanian
rbalabanian@edelson.com
13 Eve-Lynn Rapp
erapp@edelson.com
14 Todd Logan
tlogan@edelson.com
15 123 Townsend Street, Suite 100
San Francisco, CA 94110
16 Tel: 415.212.9300

17 **Defendant's Trial Counsel**

18 SUSMAN GODFREY LLP
19 Matthew R. Berry (WSB No. 37364)
mberry@susmangodfrey.com
20 Steven M. Seigel (WSB No. 53960)
sseigel@susmangodfrey.com
21 1201 Third Avenue, Suite 3800
22 Tel (206) 373-7394
Fax (206) 516-3883

23 **XV. COMPLICATIONS OF TRIAL DATE**

24 The Parties currently do not have complications regarding the setting of a trial date.

25 **XVI. SERVICE OF PROCESS**

26 Defendant has been served.

1 **XVII. SCHEDULING CONFERENCE**

2 The Parties do not request a scheduling conference, but request that the Court issue a
3 scheduling order consistent with the proposed deadlines outlined in this statement. At the
4 Court's direction, the Parties will submit a stipulated proposed scheduling order.

5 **XVIII. CORPORATE DISCLOSURE STATEMENT**

6 Defendant filed its disclosure statement on May 8, 2015.

7 **XIX. CAMERAS IN THE COURTROOM**

8 Plaintiff consents to the Judiciary's Pilot Project on Cameras in the Courtroom.

9 Defendant opposes this case's inclusion in the Pilot Project.

10 Dated: January 28, 2019

11 By: /s/ Janissa A. Strabuk
One of Plaintiff's Attorneys

12 TOUSLEY BRAIN STEPHENS PLLC
13 Janissa A. Strabuk, WSBA #21827
14 Cecily C. Shiel, WSBA # 50061
15 1700 Seventh Avenue, Suite 2200
16 Seattle, Washington 98101-4416
17 Tel: 206.682.5600
Fax: 206.682.2992
Email: jstrabuk@tousley.com
Email: cshiel@tousley.com

18 EDELSON PC
19 Rafey Balabanian*
rbalabanian@edelson.com
20 Eve-Lynn Rapp*
erapp@edelson.com
21 Todd Logan*
tlogan@edelson.com
22 123 Townsend Street, Suite 100
23 San Francisco, California 94107
24 Tel: 415.212.9300

25 *Counsel for Plaintiff and the Putative Class*
**Pro Hac Vice*

26 Dated: January 28, 2019

27 By: /s/ Matthew R. Berry
Matthew R. Berry

1 SUSMAN GODFREY LLP
2 Matthew R. Berry (WSB No. 37364)
3 mberry@susmangodfrey.com
4 Steven M. Seigel (WSB No. 53960)
5 sseigel@susmangodfrey.com
6 1201 Third Avenue, Suite 3800
7 Tel (206) 373-7394
8 Fax (206) 516-3883
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27